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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO;
AMERICAN FEDERATION OF STATE
COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO, et al.,

Plaintiffs,

v.

UNITED STATES OFFICE OF PERSONNEL
MANAGEMENT, et al.,

Defendants.

Case No. 3:25-cv-01780-WHA

**PLAINTIFFS' RESPONSE TO MARCH 7
NOTICE RE: IRS, SUBMISSION OF
DECLARATION, AND REQUEST FOR
GUIDANCE RE: FURTHER TESTIMONY**

1 Plaintiffs hereby respond to the March 7, 2025 Letter from Defendants' Counsel (Dkt. 68)
 2 regarding Traci DiMartini, the Chief Human Capital Officer ("CHCO") of the Internal Revenue
 3 Service ("IRS") who was placed on administrative leave following the discussion of Ms.
 4 DiMartini's statements regarding probationary employees and OPM direction in Plaintiffs' TRO
 5 papers (Dkt. 39-5) and this Court's February 28 written TRO order (Dkt. 45 at 4-5). Defendants'
 6 letter contains serious misstatements of fact, as explained below. As set forth in her declaration
 7 filed in another case, which is attached as Exhibit A to the accompanying Declaration of Stacey
 8 Leyton, Ms. DiMartini has information that is directly relevant to this matter, involving OPM's
 9 directions to agencies to terminate probationary employees, and the adverse personnel actions
 10 taken against her are directly related to that issue.

11 Plaintiffs therefore file this response, along with that declaration by Ms. DiMartini, for
 12 three purposes: (1) to correct the representations Defendants made to the Court, (2) to add Ms.
 13 DiMartini's declaration to the record in this case, and (3) if the Court wishes to hear Ms.
 14 DiMartini's testimony on Thursday, March 13, 2025, to inform the Court that, per her counsel, Ms.
 15 DiMartini is available to appear but only pursuant to a subpoena.

16 **BACKGROUND**

17 As this Court is aware, on February 26, 2025, Plaintiffs submitted a video recording and
 18 transcript of a February 21 town hall that Ms. DiMartini held over zoom with IRS employees, in
 19 which Ms. DiMartini stated that the Office of Personnel Management had ordered the IRS to
 20 terminate its probationary employees. Dkt. 39-5. The Court quoted Ms. DiMartini's statements to
 21 this effect both at the February 27 hearing, Dkt. 44 at 18:4-10, and in its February 28 written TRO
 22 order, Dkt. 45 at 4-5.

23 On the afternoon of Monday, March 3, 2025, Ms. DiMartini was notified that she was being
 24 placed on administrative leave with the intention to terminate her employment. Declaration of
 25 Stacey Leyton ¶4, Ex. A. After this fact was reported in the New York Times, Plaintiffs notified
 26 this Court at the status conference on March 6. The Court directed Defendants to investigate and to
 27 file a letter or statement regarding the report by the following day. Dkt. 65 at 20:17-21:19.
 28

1 Defendants' counsel did so, representing in a letter filed on March 7 that "Treasury
2 Department officials indicated that the consideration to place [Ms. DiMartini] on administrative
3 leave involves circumstances separate from those at issue in this case and was contemplated prior
4 to and made without any knowledge of this case." Dkt. 68 at 2. Their letter further asserted that
5 "issues related to the employment status of the IRS employee at issue go beyond the scope of this
6 litigation. These assertions involve neither claims advanced by Plaintiffs nor Defendants in this
7 suit." *Id.*

8 Defendants' counsel also relied on the fact that the Department of Treasury was at that time
9 not a party to this case (which is no longer true in light of this Court's order granting amendment,
10 Dkt. 88). Defendants' counsel's further statement that "[n]or, moreover, has the employee
11 personally participated in this litigation as a witness or otherwise" misses the point: Ms.
12 DiMartini's statements were put before this Court as a witness to OPM's unlawful actions, and Ms.
13 DiMartini is available to present testimony on this issue (and as the declaration submitted herewith
14 makes clear, Ms. DiMartini has relevant knowledge regarding OPM's actions).

15 On March 7, the plaintiffs in *Maryland v. U.S. Dept. of Agriculture*, Case No. 25-00748-
16 JKB (D. Md.), filed a declaration from Ms. DiMartini, in which she declares that Department of
17 Treasury CHCO Trevor Norris informed her and others that the mass terminations of IRS and other
18 Treasury probationary employees were made at the direction of OPM, and states that probationary
19 employees' job performance and conduct was neither reviewed nor considered before they were
20 terminated. Leyton Decl. ¶4, Ex. A (¶¶8-18). The declaration also states that when Ms. DiMartini
21 was placed on leave pending termination on March 3 she was told that it was for three reasons,
22 including that she "*did not effectively implement the termination of probationary employees.*" *Id.*,
23 Ex. A ¶23 (emphasis added).

24 This declaration itself is relevant evidence; and establishes that Ms. DiMartini has relevant
25 testimony to present at the March 13 evidentiary hearing to refute OPM's factual assertions in this
26 case and to clarify the record. It demonstrates the inaccuracy of Defendants' representation that
27 Ms. DiMartini's leave "involves circumstances separate from those at issue in this case." Dkt. 68
28 at 2.

1 Plaintiffs issued a subpoena for Ms. DiMartini's testimony on March 6 following the status
 2 conference, and Defendants accepted service on her behalf on March 7. Leyton Decl. ¶¶2-3; Dkt.
 3 76-3. On March 10, Defendants informed Plaintiffs that Ms. DiMartini was represented by counsel
 4 and so they were withdrawing their acceptance of service of the subpoena for her testimony.
 5 Leyton Decl. ¶5. Plaintiffs thereafter asked Ms. DiMartini's counsel to accept service and to
 6 confirm Ms. DiMartini's availability to testify at the March 13 evidentiary hearing. *Id.* ¶6. Ms.
 7 DiMartini's counsel confirmed that Ms. DiMartini is available to testify and would comply with a
 8 subpoena to testify if the IRS permitted her to do so. *Id.*

9 Plaintiffs sent an e-mail to Defendants' counsel informing them of these facts and asking
 10 them to confirm by this morning "that Ms. DiMartini will not be subject to any adverse or other
 11 employment action based on her compliance with the subpoena or her testimony on Thursday." *Id.*
 12 ¶7, Ex. B. In response, Defendants' counsel refused to provide that assurance. Instead,
 13 Defendants' counsel stated again that the placement of Ms. DiMartini on "administrative leave
 14 involves circumstances separate from those at issue in this case" and so her "employment status,
 15 and [Plaintiffs'] requests for [Defendants] to confirm additional information ... are both outside the
 16 scope of this case," and that Defendants "cannot devote additional time and resources to answering
 17 your inquiries about Ms. DiMartini." *Id.* ¶8, Ex. B. The e-mail further "note[d] that any testimony
 18 by Ms. DiMartini would appear to implicate Treasury and IRS procedures." *Id.*

19 Plaintiffs complied with the *Touhy* regulations in issuing the subpoena to Ms. DiMartini.
 20 *Id.* ¶2; Dkt. 76-3; *see also Res. Invs., Inc. v. United States*, 93 Fed. Cl. 373, 380 (2010) ("[W]hen
 21 the United States is a party to the litigation, the reach of disclosure-limiting *Touhy* regulations ends
 22 at the courthouse doors.").

23 . Based on communications with Ms. DiMartini's counsel, Plaintiffs' understanding is that
 24 the IRS has not yet instructed Ms. DiMartini as to whether she may appear to give testimony.
 25 Leyton Decl. ¶9.

26 **REQUEST**

27 Plaintiffs submit this response for three purposes.

1 First, Plaintiffs' response refutes Defendants' counsel's representations to this Court
2 regarding the circumstances of Ms. DiMartini's administrative leave. The stated reasons that the
3 agency gave to Ms. DiMartini for placing her on administrative leave with plans to terminate her *at*
4 *a minimum* confirm that the agency's actions are related to her handling of the probationary
5 employee terminations at issue in this lawsuit.

6 Second, given its relevance, Plaintiffs request that Ms. DiMartini's declaration be added (in
7 lieu of testimony) in support of Plaintiffs' preliminary injunction motion. Ms. DiMartini's
8 declaration refutes representations made by Defendants both with respect to the facts at issue in
9 this case and regarding the adverse employment action that followed this Court's citation of her
10 statements,.

11 Third, Plaintiffs would be prepared to present Ms. DiMartini's testimony regarding the
12 central issues in dispute in this case (OPM's directions to agencies) at the upcoming hearing,
13 including for cross-examination. Although this Court's March 10 order provided that "government
14 employees who have not submitted declarations ... need not be produced at the March 13 hearing,"
15 Dkt. 89, Ms. DiMartini's circumstances and statements, previously cited by the Court, were put at
16 issue by Defendants' representations to the Court, including by their representations that the
17 agencies' actions were not directed by OPM.

18 Ms. DiMartini's counsel has confirmed her availability to testify. Leyton Decl. ¶6. As a
19 current employee on leave, Ms. DiMartini would need protection from this Court in the form of an
20 order enforcing the subpoena. According to her counsel, however, Ms. DiMartini's employing
21 agency has not provided a response confirming whether she may appear in response to the
22 subpoena. *Id.* ¶9. And as Defendants' counsel's e-mail this morning made clear, Defendants will
23 not confirm that she may testify. Instead, Defendants' counsel continues to insist that Ms.
24 DiMartini "is not a probationary employee;" that "the consideration to place Ms. DiMartini on
25 administrative leave involves circumstances separate from those at issue in this case," and that
26 "Ms. DiMartini's employment status ...[is] outside the scope of this case." Leyton Decl. ¶8, Ex. B.

27 Plaintiffs therefore request the Court's guidance as to whether Ms. DiMartini's testimony
28 would assist the Court's determination, and if so, request a Court order enforcing the subpoena. As

Ms. DiMartini has good cause to be concerned regarding further retaliation, an order from this Court enforcing the subpoena would alleviate that concern.

CONCLUSION

Plaintiffs therefore submit Ms. DiMartini's declaration for the record in this case and, should the Court require her presence for testimony and cross-examination, request an order enforcing the subpoena previously served by Plaintiffs.

Respectfully submitted,

DATED: March 11, 2025

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